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FILED
DEC 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-167

In The
Supreme Court of the United States
October Term, 1989

UNITED STATES OF AMERICA,
Petitioner,

v.

[illegible] MONTALVO-MURILLO,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE [illegible] CIRCUIT

BRIEF

[illegible]

QUESTION PRESENTED

Whether the government can obtain the pretrial detention without bond of a person when a detention hearing has not been held in compliance with the mandatory provisions of the Bail Reform Act, 18 U.S.C. § 3142(f).

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No. 89-163

In The

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UNITED STATES OF AMERICA,

Petitioner,

v.

GUADALUPE MONTALVO-MURILLO,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

In the early morning hours of Wednesday, February 8, 1989, Guadalupe Montalvo-Murillo, a resident alien who spoke little or no English, was arrested in Orogrande, New Mexico, when 72 pounds of cocaine were discovered in the truck he was driving. Pet. App. 4a, 17a, Tr. 73-77 (Feb. 23, 1989). He was taken by the arresting agents to Las Cruces, New Mexico, the site of the nearest available magistrate. However, instead of taking him before a federal magistrate, the agents questioned him

and then took him to Chicago, Illinois, so he would assist them in apprehending the others involved when he made delivery at the designated location. Pet. App. 4a-5a, 17a, Tr. 82 (Feb. 23, 1989). Unfortunately for Mr. Montalvo, this plan failed.

He was finally brought before a federal magistrate in the Northern District of Illinois on February 10, 1989, over forty-eight hours after his arrest in the District of New Mexico. At this initial appearance, the magistrate advised Mr. Montalvo of his rights and then went on to question counsel about bond and the status of the case. The magistrate was puzzled as to why bond had not been set earlier in New Mexico, stating "[T]his is different from anything I ever heard of before." J.A. 14-19, Pet. App. 5a-6a, 18a-19a.

Athough the government moved to detain Mr. Montalvo at the initial appearance in Chicago, it was ultimately agreed that Mr. Montalvo would be immediately removed to the District of New Mexico for his detention and preliminary hearings. J.A. 16-19. Mr. Montalvo arrived in Las Cruces later that same day, accompanied by the same agents that had taken him to Chicago. Pet. App. 6a, 19a. However, his detention hearing was not held until February 21, 1989, some thirteen days after his arrest and eleven days after the government moved to detain him. J.A. 4.

In the interim, the government contacted the magistrate's office in Las Cruces. It is unclear whether that office was advised that the government had moved to detain Mr. Montalvo or that it would move to detain him. In any event, the government did not advise the court of

the need for a prompt setting. Consequently, a hearing was set for February 16, 1989. J.A. 45-46. In this interim, Mr. Montalvo was unrepresented by counsel.

At that hearing on February 16, 1989, the government failed to inform the court or counsel that it had moved to detain Mr. Montalvo in Chicago. As a result, the magistrate appeared to be somewhat confused as to the status of the proceedings. The magistrate proceeded with the hearing as though it were an initial appearance, advising Mr. Montalvo of his rights, the charges against him, and the maximum penalty. J.A. 21-22. Consistent with his treatment of that hearing as an initial appearance, the magistrate "continued the detention hearing for a maximum of three working days" J.A. 23.

Mr. Montalvo's counsel, unaware that the government had moved to detain Mr. Montalvo, objected to the detention hearing, based on her understanding that the government had not moved to detain defendant in Chicago. J.A. 23. The attorney for the government did not advise the court that it had already moved to detain the defendant, nor did he correct counsel. Yet, neither did the government move to detain the defendant at that time. Consequently, the Court set the detention hearing for February 21, 1989, over Defendant's objection. J.A. 3.

On February 21, the detention hearing was held over defense counsel's renewed objection. At the conclusion of the hearing, the magistrate set a $50,000 bond and imposed certain other restrictions which he found would reasonably assure the safety of the community and the defendant's appearance. J.A. 34-38, Pet. App. 8a, 20a. The government appealed to the district court and a hearing

was held on February 23, 1989. On appeal, the district court found that the government's failure to comply with the mandatory provisions of the Bail Reform Act precluded the detention of Mr. Montalvo. The court did, however, increase his bond to $88,500. Pet. App. 16a-17a, 31a. The Tenth Circuit affirmed. Pet. App. 1a-15a.

SUMMARY OF THE ARGUMENT

The Bail Reform Act of 1984's unambiguous language allows the government to do something it was unable to do prior to the passage of that legislation – seek to detain a person in a non-capital case without bond pending trial. 18 U.S.C. §§ 3141 *et seq*. However, the Act only allows pretrial detention under certain circumstances. Section 3142(e) provides that a person may be detained without bond after a detention hearing held pursuant to the provisions of 18 U.S.C. § 3142(f). One of the provisions of that section is that the detention hearing be held upon the person's first appearance before the judicial officer, and that, "except for good cause," the defendant may get a continuance of no more than five days, and the government may get a continuance of no more than three days. 18 U.S.C. § 3142(f).

In the present case, the government moved to detain Mr. Montalvo at his initial appearance, but he was not afforded a detention hearing until eleven days later. This delay was not caused by the defendant and was not the fault of the court. The delay was caused in part by the government's violation of the Federal Rules of Criminal

Procedure in transporting Mr. Montalvo from New Mexico to Chicago without first taking him before a magistrate.

The government manufactured a bizarre situation when they took Mr. Montalvo for an initial appearance in Chicago and there moved to detain him, although New Mexico was both the district of arrest and the charging district. This condition worsened, when, once back in New Mexico, the government failed to inform either the court or defense counsel of the nature of the proceedings in Chicago.

The government's suggestion of balancing the interests of the parties in this situation has already been done. Congress balanced the interests of the parties when it drafted the Bail Reform Act, and it has spoken in clear, unambiguous language. To accept the government's suggestion, that if a timely detention hearing is not held then a hearing should be held as soon thereafter as is practicable, would render the clear language of the statute meaningless, a result that Congress clearly did not intend.

Pretrial detention may only be sought under the narrow circumstances set forth in the Act. The Act did not grant new protections to a defendant, it granted additional powers to the government. Those powers are, however, strictly limited so that the statute does not violate a person's due process rights. Because the statute is a grant of power, a failure to follow the terms of the statute precludes the government from using that power to detain a person.

Contrary to the assertion of the government, the ruling of the Court of Appeals will not result in severe

consequences. The situation out of which the instant case arose was factually unique, and created by the government ignoring the Federal Rules of Criminal Procedure and failing to comply with the mandatory provisions of the Bail Reform Act. Accordingly, the lower courts were correct in finding that congressional intent can only be fulfilled if the government is precluded from detaining a person without bond when the provisions of section 3142(f) are not followed.

ARGUMENT

THE GOVERNMENT CANNOT OBTAIN THE PRETRIAL DETENTION OF A PERSON WITHOUT BOND IF A DETENTION HEARING HAS NOT BEEN HELD IN COMPLIANCE WITH THE MANDATORY PROVISIONS OF THE BAIL REFORM ACT, 18 U.S.C. § 3142(f).

A. The Unambiguous Language Of The Bail Reform Act Requires A Timely Detention Hearing As A Condition For Pretrial Detention Without Bond.

In drafting the Bail Reform Act of 1984, Congress carefully delineated the circumstances under which pretrial detention would be permitted. *United States v. Salerno*, 481 U.S. 739, ___, 107 S.Ct. 2095, 2103, 95 L.Ed.2d 697 (1987). Section 3142(e) of the Bail Reform Act provides, in part:

> If, after a hearing pursuant to the provisions of subsection (f) of this section, the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial.

Congress indicated its intention that this section meant detention may be ordered *only* after a hearing pursuant to subsection (f). S.Rep. No. 255, 98th Cong., 2nd Sess. 20, *reprinted in* 1984 U.S. Code Cong. & Ad. News 3182, 3203 (hereinafter S.Rep. No. 255).

Section 3142(f) then sets forth certain requirements of the detention hearing, which Congress termed "precondition[s] of pretrial detention",[1] one of which is that:

> The hearing shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance. Except for good cause, a continuance on motion of the person may not exceed five days, and a continuance on motion of the attorney for the Government may not exceed three days.

Although the government and many courts have referred to the above-quoted text as the "first appearance provision," it is helpful to separate the two procedural requirements therein. The first sentence contains the actual "first appearance provision," i.e., that the motion to detain must be made upon the person's first appearance before the judicial officer.[2] The second procedural issue is in the second sentence, which contains the time limitations for a continuance of a detention hearing. Legislative history reveals that Congress specifically took the

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[1] S.Rep. No. 255 at 18.

[2] There is some dispute as to the interpretation of this sentence, see note 11, *infra*.

latter time limitations from the District of Columbia Code, although the "first appearance" requirement is original. S.Rep. No. 255 at 22.

Because Congress specifically cited the District of Columbia Code, it is useful to look at that statute. The District of Columbia Code has no first appearance requirement, and in fact, specifically allows a motion to detain "[w]henever the person is before a judicial officer" or "[w]henever the person has been released . . . and it subsequently appears that such person may be subject to pretrial detention . . . ." D.C. Code § 23-1322(c)(1) and (2). The continuance provision, however, in the District of Columbia Code is similar to the one in the Act:

> The pretrial detention hearing shall be held immediately upon the person being brought before the judicial officer *for such hearing* unless the person or the United States attorney moves for a continuance. A continuance granted on motion of the person shall not exceed five calendar days, unless there are extenuating circumstances. A continuance on motion of the United States attorney shall be granted upon good cause shown and shall not exceed three calendar days. The person may be detained pending the hearing.

D.C. Code § 23-1322(c)(3) (emphasis added).[3]

The language of the District of Columbia Code, like the language of the Act, is mandatory. Section 23-1322(b)

[3] The fact that Congress omitted the emphasized language, as well as the specific allowances for a motion to detain to be filed at any time, supports the "first appearance provision" of the Act. *See United States v. Holloway*, 781 F.2d 124, 128 (8th Cir. 1986).

provides that "[n]o person . . . shall be ordered detained unless the judicial officer holds a pretrial detention hearing in accordance with the provisions of subsection (c) of this section . . . ."

In the present case, the government timely moved to detain Mr. Montalvo at his initial appearance in Chicago. The language used by the attorney for the government in Chicago was somewhat ambiguous, but she herself, in a conference call with the court, represented to the district court in New Mexico that she had moved for detention in Chicago. Tr. 59 (Feb. 23, 1989). Additionally, although the government now retreats from that position, it vigorously argued to the district court that it had moved for detention in Chicago. Tr. 6, 9, 10, 13, 14, 15, 18, 21, 24, 27, 32, 40, 52, 54 (Feb. 23, 1989). In any event, the court of appeals found that the government had adequately moved to detain at the initial appearance in Chicago. Pet. App. 11a.[4]

Consequently, it is not actually the "first appearance" requirement that was violated in the present case, but the

[4] If the Court finds that the government did not move to detain in Chicago, neither should it find that it moved to detain at the first appearance in Las Cruces. The government is confused in its brief when it asserts that it "expressed its intention to seek detention" in Las Cruces. Pet. Brief at n.3. That expression occurred in Chicago, not at the February 16, 1989, hearing in Las Cruces. The government did not express its intention to seek detention in New Mexico until it filed its written motion on February 17, 1989, which would have been untimely but for the prior motion to detain made in Chicago. The district court, without deciding whether the government moved to detain in Chicago, found that the provisions of section 3142(f) had been violated regardless. Pet. App. 29, n.5.

continuance provision. Mr. Montalvo was not given a detention hearing until eleven days after the motion to detain was made. There was no motion for continuance made, and none granted until the magistrate did so, sua sponte, on February 16, 1989, over Mr. Montalvo's objection.[5]

Although the first appearance requirement of the Act has been open to some interpretation,[6] the continuance provisions of section 3142(f), or the similar provision of the District of Columbia Code, could not be clearer.[7] Nevertheless, the government is asking this Court to write the continuance provision out of the Act.

An analysis of the meaning of the statute must start with the language of the statute itself. *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685, 105 S.Ct. 2297, 2301, 85 L.Ed.2d 692 (1985). This is also where the analysis should end "for where the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *United States v. Ron Pair Enterprises*, 489 U.S. ___, ___, 109 S.Ct. 1026, 1030, 103 L.Ed.2d 290 (1989)(quoting

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[5] On February 16, 1989, counsel for Mr. Montalvo clearly objected to the magistrate setting a detention hearing the following week, J.A. 23, and the magistrate so found at the later hearing. J.A. 32.

[6] Compare, for example, *United States v. Maull*, 773 F.2d 1479 (8th Cir. 1985)(en banc), with *United States v. Holloway*, 781 F.2d 124 (8th Cir. 1986).

[7] There has been some dispute as to the method of calculation time, but that issue is not involved here. Even without counting weekends and holidays, the continuance limit was violated.

Caminetti v. United States, 242 U.S. 470, 485, 37 S.Ct. 192, 194, 61 L.Ed. 442 (1917).

The terms "shall" and "may not" in section 3142(f) are mandatory, not precatory, language. It is well established that Congress knows the difference between mandatory and precatory language, and can use whichever language is necessary to effectuate its intent. *See, e.g., Mallard v. United States District Court for the Southern District of Iowa*, ___ U.S. ___, ___, 109 S.Ct. 1814, 1818, 104 L.Ed.2d 318 (1989) ("request" is precatory as opposed to "shall" which is mandatory).

Courts of appeals have construed the language of section 3142(f) as mandatory, although some have found that the right to a timely hearing can be waived. *See United States v. Coonan*, 826 F.2d 1180, 1184 (2d Cir. 1987)(agreeing that the court's prior decision in *United States v. Payden*, 759 F.2d 202 (2d Cir. 1985) appropriately met "the statutory imperative of addressing the detention issue at the initial appearance"); *United States v. Clark*, 865 F.2d 1433, 1437 (4th Cir. 1989)(en banc)(by recognizing the necessity of a knowing and voluntary waiver of time limitations, the court acknowledged the mandatory language of the statute); *United States v. O'Shaughnessy*, 764 F.2d 1035, 1038 *vacated on reh'g as moot*, 772 F.2d 112 (5th Cir. 1985)(court should not "deviate from the Act's unambiguous mandatory language"); *United States v. Holloway*, 781 F.2d 124, 128 (8th Cir. 1986)(court not willing to rewrite the Act by "reading out of the statute completely the requirement that a detention hearing be held upon a defendant's first appearance"); *United States v. Al-Azzawy*, 768 F.2d 1141, 1145 (9th Cir. 1985)("procedures under section 3142 of the Act must be strictly followed as a

precondition to detention under subsection (e)"); *United States v. Rivera*, 837 F.2d 906, 925, *reh'g granted on other grounds*, 847 F.2d 660 (10th Cir. 1988)(failure to hold detention hearing demanded by the statute "inexcusable"); and *United States v. Alatishe*, 768 F.2d 364, 369 (D.C. Cir. 1985) (although court made a unique exception for an unobjected to sua sponte continuance, it found that "the statute explicitly requires that a 3142(f) hearing be conducted 'immediately' following a timely motion for pretrial detention").

In the present case, there is no question that Mr. Montalvo did not waive the time limitations in the Act. The magistrate found after the initial appearance in Chicago that she would enter an order "specifically reserving the issues of intention [sic] detention and probable cause for determination by the District of New Mexico . . . ." J.A. 19. She also stated the understanding that Mr. Montalvo would be "transported promptly." *Ibid.* The attorney for the government represented to the court that Mr. Montalvo would be transported back to New Mexico that same day, *Ibid.*, and in fact he was. Pet. App. 6a, 19a. Under those circumstances, there is no reason to suppose that Mr. Montalvo waived any time period limitations.[8]

Additionally, once back in New Mexico, in the custody of the government, Mr. Montalvo was unrepresented

[8] The district court specifically found that "the defendant did not knowingly and voluntarily waive his right to a detention hearing or waive his rights to the time limits contained in the statute." Pet. App. 27a. That finding of fact should remain undisturbed by this Court.

until February 16, 1989,[9] and consequently unable to petition the court for an earlier hearing. Although Mr. Montalvo was represented by counsel at the February 16, 1989, hearing, the court and defense counsel were not made aware of the proceedings in Chicago by the one common party to both hearings – the government.

Mr. Montalvo was held in custody for thirteen days after his arrest, and eleven days after the government moved to detain him, before he was afforded a hearing. The delay was through no fault of his own, or of the courts. The government asks this Court to fashion a "remedy" that would permit unfettered violation of the provision of section 3142(f). As set forth below, the Court should not create a remedy where Congress has purposefully provided none.

B. The Bail Reform Act Does Not Provide A Remedy For An Untimely Detention Hearing Because Under the Clear Terms Of The Statute, A Hearing May Not Be Held Outside Of The Time Limits Set Forth In The Statute.

The court of appeals found that Congress did not provide a remedy for a failure to observe the requirements of section 3142(f). Pet. App. 13a. That court agreed with the district court that the only meaningful remedy for such a failure was release on conditions. Pet. App. 15a, 31a.

[9] Counsel was appointed by the court the previous day, but did not have an opportunity to speak to Mr. Montalvo until the 16th. Tr. 37 (Feb. 23, 1989).

Although the court reached the correct conclusion, that release on conditions was mandated, it was not correct in its characterization of this result as a "remedy". Where the mandatory language of the statute requires a hearing to be held within a certain period of time, the hearing simply cannot be held otherwise. Consequently, the result of the failure to comply with the provisions of the Act, is the conclusion that the February 21, 1989, hearing before the magistrate was not a detention hearing but rather a bail hearing to set conditions of release under section 3142(c).

Rule 4(a) of the Federal Rules of Appellate Procedure provides a useful analogy. The Rule requires that a notice of appeal "shall be filed" within thirty days of the entry of final judgment in a civil case. There is a provision for an extension of time upon a showing of "excusable neglect." Rule 4(a)(5). There is not, however, any remedy in the Rule for a failure to timely file a notice of appeal.

The courts have not attempted to manufacture any remedy for the failure to timely file a notice of appeal. It has been held that the timely filing of the notice is mandatory and jurisdictional. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61, 103 S.Ct. 400, 403, 74 L.Ed.2d 225 (1982). "Rule 4(a) is not jurisdictional in the subject matter jurisdictional sense, it is nonetheless mandatory and a necessary prerequisite for appellate review." *Andre v. Guste*, 850 F.2d 259, 262 (5th Cir. 1988)(citations omitted); *Haney v. Mizell Memorial Hospital*, 744 F.2d 1467, 1472 n.3 (11th Cir. 1984).

Andre v. Guste, 850 F.2d 259, is a particularly instructive opinion on the construction of Rule 4(a). In that case,

appellant failed to timely file a notice of appeal from the denial of his petition for writ of habeas corpus. He attempted to file a second petition, on the same grounds, because he was prevented from filing his notice of appeal on the first. The Fifth Circuit rejected his attempt to sidestep Rule 4(a):

> If we were to hold that, despite Andre's failure to timely appeal the dismissal of his first petition, Andre could obtain an out-of-time appeal by the simple expedient of refiling his first petition, that would be tantamount to doing away with the clear requirements of Rule 4 for an entire class of litigation.

Andre v. Guste, 850 F.2d at 263.

So too, in the present case, would the Court do away with the clear requirements of section 3142(f) if it allows the government to "remedy" an untimely hearing by holding one at a later date.

Section 3142(f), upon a finding of "good cause", allows for an exception to the time limits therein. Rule 4(a) similarly contains an exception to the time limit upon a showing of "excusable neglect." These are the escape valves in the Act and in the Rule that make a "remedy" unnecessary.

In the normal course of proceedings, if there is some reason a detention hearing cannot or should not be held within the time limits of section 3142(f), the parties will alert the court. The court then has the opportunity to find if there is good cause for a continuance past the time limits set forth in the Act.

In the present case, the government was the only party aware of the procedural irregularities, and it failed to bring them to the court's attention. Under Rule 4(a), a late filing of a notice of appeal will not substitute for the filing of a motion for an extension of time. *Pryor v. Marshall*, 711 F.2d 63, 64-65 (6th Cir. 1983)(the Rule means what is says, and the only exception permitted is the excusable neglect provision of Rule 4(a)(5)). Neither should an untimely hearing substitute for a motion for a continuance for good cause.

This Court has been unwilling to find exceptions to the clear and unambiguous language of Congress. *United States v. Monsanto*, ___ U.S. ___, ___, 109 S.Ct. 2657, 2662, 105 L.Ed.2d 512 (1989) (Congress could not have used stronger words to express its intent than that a court "shall order" forfeiture of all property). The Act unambiguously excludes any continuance outside the time limits, except for good cause. The fact that Congress is silent on a particular situation does not demonstrate ambiguity, but rather breadth. *Id.* at 2663.

The Court need not find a "remedy" for a violation of the time limits in section 3142(f), because the language of the statute is clear that a detention hearing cannot be held outside those time limits. Neither should the Court create an exception to those limits. Congress provided the only necessary exception to the time limits by allowing for a further continuance upon a showing of good cause. To find otherwise would be to read the time limits out of the statute entirely.

C. The "Remedy" Proposed By The Government Is Contrary To The Clear Intent Of Congress And Would Eviscerate The Statute.

The government proposes to the Court that the "remedy" for an untimely hearing should be to hold the hearing at the earliest opportunity after the time limits have run. Given the clear language of the statute, this "remedy" is unavailable.

The Bail Reform Act was drafted with the understanding that the interests of society should be balanced against the rights of an arrested person. The Senate Judiciary Committee recognized that:

> a pretrial detention statute may . . . be constitutionally defective if it fails to provide adequate procedural safeguards or if it does not limit pretrial detention to cases in which it is necessary to serve the societal interests it is designed to protect. The pretrial detention provisions of this section have been carefully drafted with these concerns in mind.

S.Rep. No. 255 at 8. As a result, Congress drafted a statute that is "appropriately narrow in scope, and that provides necessarily stringent safeguards to protect the rights of defendants." *Id.* at 7.

One of the important procedural safeguards in the Act is the strict time requirements in section 3142(f). Congress indicated its concern that a defendant is entitled to a prompt detention hearing:

> The period of a continuance sought by the defendant and of one sought by the government is confined to five and three days, respectively, in light of the fact the defendant will be detained during such a continuance.

S.Rep. No. 255 at 22.

Such time limitations are consistent with due process, because as one court has found, "failure to hold the hearing, or make provision for a short continuance, at the initial appearance means that no attention would have been paid to the detention of the defendant, a situation raising grave constitutional problems." *United States v. Coonan*, 826 F.2d at 1184.

This Court has had the opportunity to rule on the constitutionality of the Act in *United States v. Salerno*, 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). The Court found that one of the procedural protections in the Act was the right to a prompt hearing. *Id.* at 2101. The Court weighed this and the other procedural protections in the Act against society's interest in crime prevention, and found

> Given the legitimate and compelling regulatory purpose of the Act and the procedural protections it offers, we conclude that the Act is not facially invalid under the Due Process Clause of the Fifth Amendment.

Id. at 2104.

Here, however, we are concerned not with a constitutional violation, but with a statutory violation.[10] Generally, this Court will construe a statute to avoid a decision as to its constitutionality. *United States v. Monsanto*, 109 S.Ct. at 2664. The Court has already decided in *Salerno* that the Act is constitutional based on the procedural

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[10] The cases cited in Petitioner's brief at n.7, p.16, are inapposite. All of those cases deal with the post-conviction review of a constitutional violation of the defendant's rights.

protections provided therein. The Court need not address whether the Act would be constitutional if the procedural protections were not upheld. In any event, the language of the statute is mandatory, and consequently the Court need not decide whether due process requires that the statute be followed. Neither may it ignore the statute if it views the result of its violation a "windfall" for the defendant.

> Judicial perception that a particular result would be unreasonable may enter into the construction of ambiguous provisions, but cannot justify disregard of what Congress has plainly and intentionally provided.

Commissioner of Internal Revenue v. Asphalt Products Co., Inc., 482 U.S. 117, ___, 107 S.Ct. 2275, 2278, 96 L.Ed.2d 97 (1987).

Additionally, Rule 52(a) of the Federal Rules of Criminal Procedure is inapplicable to a violation of the Act. That Rule, as well as the corollary in civil law, 28 U.S.C. § 2111, applies to post-judgment review. This concept of harmless error applies to the determination of whether the error could have contributed to a conviction. *Pope v. Illinois*, 481 U.S. 497, ___, 107 S.Ct. 1918, 1922, 95 L.Ed.2d 439 (1987); *Chapman v. California*, 386 U.S. 18, 23, 87 S.Ct. 824, 827, 17 L.Ed.2d 705 (1967).

> The thrust of the many constitutional rules governing the conduct of criminal trials is to ensure that those trials lead to fair and correct judgments. Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed.

Rose v. Clark, 478 U.S. 570, 579, 106 S.Ct. 3101, 3106, 92 L.Ed.2d 460 (1986). Such is not the case here.

The thrust of the time limitations in the Act is to ensure that a defendant is afforded a prompt detention hearing. His substantial rights have been affected if he is denied a prompt hearing.

Other procedural protections in the Act, such as the right to coursel and the right to present evidence, are designed to ensure a fair dentention hearing. Although Respondent would not argue this point, it is possible that a violation of those rights could be subject to a harmless error analysis, because a defendant may have been afforded a fair hearing notwithstanding the violation. However, it is axiomatic that a defendant has not been afforded a *prompt* hearing once the time limits have been violated.[11]

Under the government's proposed "remedy", there would be no requirement for a timely detention hearing for the innocent or the guilty, for the flight risks or for those who should be released on bond. The government contends that procedural errors like the one involved in the instant case, are inevitable, and that their proposed "remedy" is necessary to prevent "increased fugitivity and criminality." Pet. Brief at 19.

[11] In *United States v. King*, 818 F.2d 115 (1st Cir. 1987) the court applied a harmless error analysis to an untimely detention hearing. Although Respondent would argue that the analysis was incorrect, in that case defendant was being held in state custody, and therefore had no liberty interest to be protected by a prompt hearing.

On the contrary, not only are the facts of the present case unique, but the procedural errors were most certainly not inevitable. The initial violation of Rule 5 of the Federal Rules of Criminal Procedure began the unusual course of events. That violation was not inevitable, but rather purposeful. Tr. 8 (Feb. 23, 1989). After the government moved to detain Mr. Montalvo in Chicago, it transported him to New Mexico, but failed to inform the court there of the status of the proceedings. This action was gross negligence at best.[12]

The government repeatedly refers to the result of the lower court's decision as "automatic release." The court, however, did not order automatic release, and in fact increased the conditions of release which the magistrate had found would reasonably assure the safety of the community and the appearance of the defendant. Indeed, automatic release "may well be disproportionate to the violation . . . and would contradict the intent evinced in § 3142(c) to protect society." *United States v. Al-Azzawy*, 768 F.2d at 1148 (court remains free to impose substantial conditions of release).

The government urges that Congress' intent in drafting the Bail Reform Act would not be served if defendant cannot be detained notwithstanding any violations of the Act. It is true that one of the aims of the Act was to decrease the frequency of crimes committed by persons

[12] The agent of the D.E.A. who was the supervisor in charge of Mr. Montalvo's case, testified that "this is a legal thing, – that he had been initialed up in Chicago, so did we have a time frame? Not that I – You know, that wasn't my concern anymore." J.A. 47.

on pretrial release. However, in a statement particularly applicable to the present case, this Court has found:

> [N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law. Where, as here, 'the language of a provision . . . is sufficiently clear in its context and not at odds with the legislative history, . . . [there is no occasion] to examine the additional considerations of "policy" . . . that may have influenced the lawmakers in their formulation of the statute.'"

Rodriguez v. United States, 480 U.S. 522, ___, 107 S.Ct. 1391, 1393, 94 L.Ed.2d 533 (1987) (citations omitted).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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December 1989